



The ALJ, nevertheless, concluded claimant did not prove by a preponderance of the credible evidence either that he had a traumatic brain injury or that he is permanently and totally disabled. The ALJ found, instead, that claimant's accident aggravated a preexisting somatization disorder, a disorder that causes claimant to develop physical symptoms in response to emotions. Based on *Boutwell v. Domino's Pizza*, 25 Kan. App. 2d 110, 959 P.2d 469, rev. denied \_\_\_ Kan. \_\_\_ (1998), the ALJ found the aggravated psychological condition is compensable. The ALJ also found, however, that claimant is not permanently and totally disabled, and in the absence of any other evidence of the extent of disability, the ALJ concluded claimant had failed to prove the extent of his disability. The ALJ, therefore, awarded claimant medical expenses only.

After reviewing the substantial record in this case, the Appeals Board agrees with the findings and conclusion of the ALJ. There are two exceptions. First, claimant argues that the ALJ relied too heavily on the testimony of physicians who testified there was no physical reason why claimant would not be able to work. Without suggesting the ALJ relied too heavily on that evidence, the Board agrees with claimant's contention that the testimony from those physicians should not, by itself, support the conclusion that claimant remains able to work. As claimant points out, several of the physicians are merely saying that from an orthopedic point of view there is no reason claimant cannot work or are saying that there are no objective neurological findings that would indicate claimant cannot work. These opinions do not rule out the possibility that claimant is unable to work for other reasons. Second, the Board agrees with claimant's contention that the fact claimant had callouses at the time he saw Dr. William D. Kossow, a physician who examined claimant in connection with his social security claim, is not proof that claimant is capable of obtaining employment in the open labor market.

But the Board has found the opinions of Dr. Dennis G. Cowan to be convincing. The Board agrees first with Dr. Cowan's conclusion that claimant's problems do not result from a closed head injury, they result from a somatoform disorder. Several factors undermine the opinion of Dr. Helffenstein and support instead the conclusion of Dr. Cowan. Specifically, the Board finds unconvincing claimant's testimony that he had amnesia for days after the accident. Evidence from the initial treating physicians, including Dr. T. L. McCue and Dr. David J. Nemmers, mention claimant was dazed but do not mention a period of amnesia. It seems unlikely that claimant would not have mentioned such a significant occurrence. In addition, claimant recalls certain events after the accident as evidenced by letters introduced into evidence. The Board also finds significant the fact that certain of the symptoms typically considered symptoms of a closed head injury, such as hearing and visual disturbances, did not appear for months after claimant's accident. The medical testimony consistently supports the conclusions that such symptoms would appear shortly after the accidental injury if they were the result of that injury. Finally, the Board finds significant the fact that claimant behaved in a similar fashion after his 1989 motorcycle accident, with multi system complaints that had no objective basis causing Dr. Forney Fleming to conclude he needed psychological help. Dr. Stang, who had agreed with Dr. Helffenstein's opinion that claimant has a closed head injury, acknowledges that claimant's symptoms are consistent with a somatoform disorder.

The Board also agrees with the conclusion that claimant is not totally disabled. As the ALJ points out, most of the medical testimony indicates claimant can work. As claimant points out, much of this testimony comes from a limited point of view. But the Board, having agreed with Dr. Cowan's diagnosis, also adopts his opinion that claimant could work. He is not totally disabled from employment. For these reasons and for the additional reasons detailed in the ALJ's Award, the Board concludes claimant is not permanently and totally disabled. Since there is otherwise no evidence of the extent of claimant's disability, the Board agrees with and affirms the ALJ's

conclusion that claimant has failed to meet his burden and permanent disability benefits should be denied.

Except as noted above, the Board adopts as its own the findings and conclusions by the ALJ as stated in the Award.

**AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Bruce E. Moore on March 23, 2000, should be, and the same is hereby, affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of November 2000.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

**DISSENT**

I disagree with the majority.

I find the most credible opinions are provided by Dr. Patrick Stang and Dr. Dennis Helffenstein, both of whom found that claimant has a closed head injury and both of whom found claimant unable to perform substantial, gainful employment.

Dr. Helffenstein's opinion is persuasive as he evaluated claimant for the State of Colorado for purposes that are totally unrelated to this claim. Dr. Stang's opinion is persuasive as he is claimant's treating psychiatrist and, therefore, is in a unique position to observe and evaluate claimant's mental condition over a period of time.

In my opinion, claimant should be awarded permanent total disability benefits.

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BOARD MEMBER

c: M. John Carpenter, Great Bend, KS  
James M. McVay, Great Bend, KS  
Bruce E. Moore, Administrative Law Judge  
Philip S. Harness, Director